Central Law Journal.

ESTABLISHED JANUARY, 1874.

VOL. 74 ST. LOUIS, MO., MAY 31, 1912. No. 22

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HARMONY BETWEEN FEDERAL AND STATE JUDICIAL SYSTEMS.

The American Bar Association's chief claim to public usefulness is its record in respect to uniform laws among the states. Harmony in law has been the key-note of a patient campaign extending over many years, in which many sheaves of victory have been brought in from the legislative field.

But all this campaign has a faulty tuning fork, which, apparently, is a very easy thing to correct, if the Association shall address itself to that end with the same zeal, patience and intelligence as shown in furthering the efforts of the Commission on Uniform Laws.

In this campaign each proposition has involved presentation of its merits to each of our state legislatures. Indeed, it often involved more than that, because state decision has been conflicting, as to some of it —notably that with reference to the Negotiable Instruments Law. Thereupon the Commissioners upon Uniform Laws—and we assume the Association brought about the existence of that body—must needs try to mend the rift in the lute of harmony.

But the faulty tuning fork of which we speak is in one legislative body of this country permitting to exist two conflicting sources of state law as to each state. Our systems can never, like Ophelia,

"Be quiring with the angels"

by means of a tuning fork that makes a "howling" by one of them partly damned, for, truly, a federal court can never give to a non-resident or alien that which a state court would deny, unless there is discord from law that is damned.

We waive discussion as to any advantage that may suppose we have been benefitted in the past by the independence of federal courts in following their own understanding of a certain body of state law, when no settled rule of property intervenes. This very qualification of independence makes its assertion *prima facie* faulty as a legal proposition. It admits that a state court may establish a rule not within the reach of other alleged independent courts—that is the superiority of state decision is conceded.

What we purpose to inquire is whether, with the increasing jurisdiction of federal courts over the subject-matter of private rights and wrongs, complete demarcation should not now be made between state and federal courts in their right of conclusive interpretation of law.

Federal courts know and can know nothing, in their essential jurisdiction, of the infraction of private right or the infliction of personal wrong. These questions are but incidental to the more perfect adaptation of the federal system to our needs—at least such is the necessary theory of the rightfulness of such legislation.

As, however, this adaptation extends and by advocates is considered enlarged opportunity for individual benefit in the working out of general good, the spheres of state action and federal power become, not only legally, but also popularly, less easily distinguished.

We might quote somewhat extendedly, in this connection, from the dissenting opinion of the Chief Justice in Henry v. A. B. Dick Company, 32 Sup. Ct. 364, but we have in mind, not so much the conflict of view about federal construction of federal law trenching upon state jurisdiction, as what may result from these diverse courts proceeding, in their appropriate jurisdiction, along similar lines.

This is exemplified by such legislation as that of the safety appliance and Employers' Liability statutes and the proposed federal Workmen's Compensation Act. It would be intolerable to suppose, that state courts would not yield obedience to ultimate federal construction of every syllable of these statutes. Indeed, Congress in the Employers' Liability statute attests its perfect faith in state courts in this regard, and the fed-

eral supreme court declares it is the duty of state courts to assist in the enforcement of that law. We commend to federal courts the same thought, when there is question of enforcing state law, with the same absence of mental reservation.

We think we perceive an opportunity in these laws for our great tribunal to develop in and of its federal authority a body of jurisprudence, that will be of the greatest assistance to state courts. It is certain, we think, that it has not been of much assistance to these courts, while it has been differing with them as to what they deemed their law to be.

We believe it to be recognized, that state courts and practitioners therein rather look to other state courts for persuasive authority upon questions than to federal courts. And, apart from any subconscious resentment at these latter courts refusing to be governed by state cases, it would seem natural that state courts should prefer decisions of other state courts.

In the first place, any discussion by federal courts of the law of another state is an incidental thing, while a state court speaks for its state and not according to the exigencies of a case. In the second place, a state court, not only presumptively, but actually, is better acquainted with the body of law of which a statute is but a part. Therefore, with more assurance of correctness may another state follow state reasoning, if the rule of construction by context is of any value.

Contrariwise, it appears that federal courts rather cite other federal decision in discussion—even in diversity of citizenship cases. They do this to the extent of citing decision of inferior federal courts, which is not binding among themselves. This may be, however, because they are not so well acquainted with state authority, a supposition bearing out what is said in our next preceding paragraph.

All of this makes a "jangle in the sweet bells" of the law. It gets one system more and more in antagonism to the other. It looks almost like it tends to one seeking reprisals from the other. At all events, it makes for popular disrespect of courts.

No man of average intelligence but knows that injustice is at work, if upon the same facts and, under the law of the same state, the same relief is not afforded. No metaphysics may confuse him as to this. And when he hears of reform in procedure and the expediting of justice, he knows there is the expediting of injustice, for there is injustice if the facts in one case are white and in the other black.

If you tell him Congress permits statutory courts to give a different justice than what state courts give, he will ask why? Is there a reason for it? And, if there is no reason and no advocate of reform in procedure—even in the foremost association of American lawyers—cries out against it, what may be thought of these reformers?

Let us suggest, though it be mildly, that these reformers who do not aim at securing uniformity of decision in every court administering the law of the same superior, as to the same state of facts, must either have their ability or their sincerity questioned, when they propose plans for simplicity in procedure or uniformity in law. Certainly the last is a chimera, if the first is not provided for.

One other potent reason, as we see it, for Congress now controlling inferior federal courts in applying the same law to the same facts that the supreme court of a state declares, is in the conditions that exist.

There is unrest in the reiterated assertion that there is one law for some and other law for others. Conflicting decision in federal and state courts is some proof of the assertion.

Are federal courts necessary aids in the interpretation of state law? If so, why not make it binding on state courts? Few, we believe, are ready to suggest this step, though the logic of law be, that the disturber of its uniform application obstructs its justice.

A final reason for this conflict to be re-

strained lies, we think, in the establishment of the Circuit Courts of Appeal. These courts differ among themselves and control respectively the district courts of their circuits. Instead of there being two conflicting rules in the interpretation of state law by virtue of federal independence, there may be more than two. What is the movement for uniform law worth, if it shall not obviate such a result? To do this would not only reconcile state and federal decision, but secure uniformity among federal courts, as well.

NOTES OF IMPORTANT DECISIONS

STATUTE OF LIMITATIONS—ACCRUAL OF ACTION UPON DISCOVERY OF FRAUD.—Under the above title we considered a ruling by Springfield (Mo.) Court of Appeals, holding in effect, that, if a notary public does nothing after he has fraudulently acknowledged as true a deed by one falsely personating the true owner of property purporting to be conveyed, this affirmative fraud is not a continuous reaffirmation of the truth of that acknowledgment so as to lull the vendee into non-action. 71 Cent. L. J. 202.

We criticised the decision on the ground that an express reaffirmation of what had been done would add nothing to what the notarial act was continuously affirming.

We think a late decision by Missouri Supreme Court assists in supporting our position. Monmouth College v. Dockery, 145 S. W. 785.

The facts in the two cases are not alike, but there runs through the Dockery case the idea, that, if a fraud is accomplished by deceit and misrepresentation, something should occur later of a specific kind to bring to the attention a doubt of the truthfulness of an original representation. In other words mere passiveness on the part of the fraudulent actor has nothing to do in the case.

Thus an approved excerpt is taken from the opinion in Fisher v. Fuller, 122 Ind. 31, 23 N. E. 523, as follows: "It is true that mere silence is not a concealment, within the meaning of the statute. But here there was a positive misrepresentation made by the party whose position required of him the utmost good faith; and that representation was a concealment of the cause of action."

It would be a strange thing to say that a false acknowledgment by a notary is good for liability a day or a year or three years and then its efficacy ceases, because its lulling effect should cease after a long time. Instead ought not its lulling influence to grow stronger with the lapse of time, if nothing intervenes to arouse from lethargy?

The ruling in the Dockery case is dissented from, but the three judges dissenting, each in a separate opinion, stress the fact that the transaction, in its very method of accomplishment, should have aroused suspicion, it being conducted differently than in the way business was to be conducted between the parties, and an innocent member of a partnership was made to bear a loss, which business prudence on the part of another would have prevented.

INSURANCE — LIABILITY UPON EMPLOYEE'S BOND WHERE DEFALCATION OCCURRED BOTH BEFORE AND AFTER RENEWAL.—In Title Guaranty & Surety Co. v. Nichols, 32 Supt. Ct. 475, there was recovery in an action on the bond of a bank cashier. There were several renewals of the bond, each being made upon a certificate by the employer that just prior thereto the books and accounts of the employee "were examined and found correct in every respect and all moneys accounted for." This certificate was not true, because the cashier was short at the time of each renewal. The court speaks of the cashier being "cunning" in throwing difficulties in the way of efforts at discovering the truth in regard to his accounts, evidence also being submitted to show that the directors of the bank were very careful and diligent in their duties. In regard to the certificate it was said: "It is not to be taken as a warranty of the correctness of the accounts. The statement is that his books and accounts had been examined and found correct. The mere fact, that the examination, if made by a reasonably competent person, failed to discover discrepancies covered up by false entries, or other book-keeping devices, would not defeat renewal. The case upon this point went to the jury upon the fact of reasonable examinations and the good faith of the bank in making the representation."

It was further said the burden of proof was not upon the bank to show, though this certificate were untrue, that it had made proper examination, but that it had not done so was for the surety to plead and prove.

While it seems patent that this certificate should not be taken as a warranty, yet it would seem, that the bank should have been required to show upon what reason it acted in the giving of it. It was in its power to establish an affirma-

tive proposition required for the validity of the renewal. Prima facie the proofs of that validity were taken away. There then was necessary a showing to be made that the certificate was justified. It was shown to be false. Who ought to justify its falsity?

EXACTNESS IN THINKING OR SPEAKING—ITS IMPORTANCE TO THE LAWYER AND TO SOCIETY.

Not many days ago the United States Senate was discussing the Phosphorus Bill. "The debate brought into contrast," says the Nation, "two Senators who represent diametrically opposite types of mind. Senator Bailey's argument was that of the firm and keen logician, not to be swerved from the clean-cut line of his thesis by any irrelevant considerations; and he was immediately followed by Senator Heyburn, whose talk was equally characteristic of the inconclusive, loose-jointed, ram-shackle type of Congressional disputant. He was disporting himself very comfortably, when Senator Gallinger suddenly brought him up with a sharp turn. Mr. Heyburn had been saying that the result sought by the bill could be reached in some other and Constitutional way, and Mr. Gallinger simply asked him to be "a little more specific' and reveal 'just how that can be done.' Whereupon the Idaho Senator, though pleading that 'it is not always an easy thing to draw a bill while on your feet addressing the Senate,' went on to state that he would nevertheless 'give some ideas.' He made a mess of the 'ideas,' and finally confessed that he had not been as successful as he had hoped in outlining to the Senate any tenable method of accomplishing the purpose."

The illustration here referred to could be reproduced in a great variety of other situations. The lawyer before the jury with his ideas all confused flounders and storms to no purpose even though he may have a good case while another man, cool, clear, exact, convinces the jury and carries off the verdict. Too many lawyers fail to recognize the importance of clear thinking and exact statement. Vague generalities and grossly misshapen "ideas" crawl out of their brains to amuse or disgust but never to convince.

More important, at least to society, is the fact that the illogical, ram-shackle type of reformer has to a large extent gained the public ear and has succeeded in stirring up public discontent without offering any remedies for the maladies which he so imperfectly diagnoses. It is not difficult for the agitator, for instance, to find out that some judges are not perfect either in the private or public life and yet his "story" leaves the public in a frame of mind of the man who is told that he is on the wrong road but is given no directions by which he might discover the right road. Many legal reformers shout anathemas at the faults of our legal procedure. When you admit the diagnosis and ask for a remedy, no suggestion of importance is offered evidencing the fact that the speaker has a very confused idea of his subject.

The danger of loose jointed mental types as reformers is referred to in the Nation again when it says: "When agitators go up and down the land declaring that tney propose to make everybody happy, and offering no substantial indication of the means by which they expect to accomplish that result, they are engaged in one of the most mischievous possible forms of human activity. They stir up vague discontent and indefinite expectations; they lead the people to believe themselves the victims of wanton and remediable wrong, without pointing out any method of removing the wrong. If one of these orators, instead of addressing a miscellaneous crowd on the nustings, were to speak where he could be brought to book as Heyburn was brought to book by Gallinger, he would fare far worse in his grand pretensions as a regenerator of society than did the Idano Senator in regard to the little matter upon which he had somewhat thoughtlessly committed himself. "I should like the Senator,' said Mr. Gallagher, 'to be a little more specific in revealing to us just how that can be done.' If this demand could be peremptorily made upon some of our eloquent saviors of society, what a comical lowering of the note would instantly result!"

We need to encourage in lawyers and public speakers the valuable and delightful habit of thinking clearly and speaking logically. We need more men in this country whose habits of tnought approach the exactness of the German scientist who speaks only seldom but who has an intent audience every time he rises to express an opinion.

Especially is it desirable that the people themselves shall be trained to think accurately and clearly. When that time comes there will then be no audience for the illogical nonconstructive public agitator and the day of the "eloquent" but inconclusive lawyer will also have passed away. A. H. R.

WHEN AND IN WHAT CASES WILL STATUTES PROVIDING ATTACHMENT PROCEEDINGS BE AVAILABLE IN SUPPORT OF ACTIONS EX DELICTO.

General Rule.—The general rule is that attachment will not lie in support of demands ex delicto, unless the specific statute involved expressly authorizes the same, or the language of the statute so clearly discloses the intention of the legislative body to extend the remedy as to irresistibly remove all doubt thereof.[1] The remedy is primarily in support of actions ex contractu. Such is its history and origin.[2] Writs of attachment as they were issued in the Lord's Mayor court of London were exercised in connection with proceedings to imprison for debt. The books also catalogue the ancient Roman practice where a debtor secreted himself in his home to elude prosecution and his goods were seized for debt after three efforts had been made to summon him.[3] Without digressing into the antiquities and primitive development and scope of writs of attachment—it is sufficient to say that the whole theory of attachment, both in its inception and subsequent growth, seems to have been upon the principle of charging the property of a *debtor* with the payment of his *debts,* or, in other words, where the relation of debtor and creditor existed, or the *claim* grew out of contract.

The majority of the statutes unmistakably contemplate the relation of debtor and creditor as an essential prerequisite to the issuance of the writ.[4] In Smith v. Armour (a Delaware case), it is said: "We have been unable to find a single case where actions in tort have been held to be within the foreign attachment statute, unless the statute expressly so provided."[5]

The writ of attachment is not a common law remedy, but is distinctly in derogation thereof. It is exclusively a statutory proceeding in this country, and has been classified by some courts as a *violent* remedy, and consequently statutes pertaining thereto are strictly construed.[6]

The Form of the Action.—There is a tendency in some jurisdictions to extend the operation of the process of attachment by holding that if the form of the action is ex contractu attachment will lie, although the cause may have originally been ex delicto, or arose out of a tort.[7] But, of course, it cannot be logically urged in any court that the writ can be invoked by a subterfuge, or by designedly disguising a tort in the mere form of an action on contract. The form of the action may warrant the issuing of the writ, but if the complaint, declaration or affidavit reveals the action to be one necessarily sounding in tort, the attachment should be dismissed instanter.[8] As said in a leading Wisconsin case,[9] in construing a statute which provided that the action must be for an indebtedness, etc., due upon a contract express or implied, "the affidavit pursues the words of the statute, and, therefore, the justice was authorized to issue the writ. But whenever it appeared, either from the declaration or the evidence, that the true cause of action was not an indebtedness due upon contract express or implied, it became his duty to dismiss the action." It ought not to be permitted a plaintiff to bring suit by attach-

(1) Mudge v. Steinhart (Cal.) 20 Pac. 147; Smith v. Armour (Del.) 40 Atl. 720; 5 Century Digest, Title, "Attachment," Sec. 2r et seq; Hart v. Barnes (Neb.) 40 N. W. 322; McDonald v. Forsyth, 13 Mo. 549; Goldmark v. Magnolia Metal Co., 65 N. J. L. 341, 47 Atl. 720.

(2) Drake, Attachments, Sec. 9-10.

(3) Adams Roman Antiquities (Wilson) 194.

(4) Hart v. Barnes, supra; Day v. Bennett, 18 N. J. Law 287; El Paso Nat'l. Bank v. Fuchss, 89 Tex. 197, 34 S. W. 206; Smith v. Armour, supra; Tabor v. Big Pittsburg Consolidated Silver Mining Company (Col.) 14 Fed. Rep. 636.

(5) 40 Atl. 720, 1 Pennew 361, 364.

(6) Vogle v. Navigation Co., 1 Hous. 294; Pennsyl. Steel Co. v. N. J. & S. R. Co., 4 Houst. 578; Bank v. Furtick, (Del. Err. & App.) 40 Atl. .....; Adler v. Cole, 12 Wisc. 188; Tiffany v. Glover, 3 Greene (Iowa) 387; McPherson v. Snowden, 19 Md. 197; Goding v. Pier, 13 R. I. 532.

(7) Shinn on Attachment and Garnishment, Vol. 1, Sec. 16, p. 25.

(8) Elliott v. Jackson, 3 Wisc. 649.

(9) Elliott v. Jackson, supra.

ment, the subject matter of which is tort and nothing else, merely because he may have made an affidavit in pursuance of the statute so as to entitle him to the writ. This would be perpetrating a fraud upon the law.

Statutes Expressly Embracing Actions in Tort or Some Class Thereof.—Some statutes expressly embrace actions ex delicto or some division thereof. Thus, under the statutes of Ohio and Nevada, an attachment will issue when the debt was *fraudulently* or *criminally* contracted.[10] So an action for damages for the wrongful conversion of personal property will warrant an attachment in some states.[11] The Georgia Code provides for attachment in support of actions "upon money demands whether ex contractu or ex delicto." Under the Ohio statute an attachment has been permitted and sustained in an action brought to recover damages for an assault and battery.[12] treating the assault and battery as coming within the provision that the liability or debt is criminally contracted. But under the same statute an attachment has been denied in support of an action for damages for malicious prosecution, on the theory that the element of crime or fraud was not necessarily present in the alleged malicious prosecution.[13] The Ohio statute uses the words "fraudulently or criminally contract the debt, or incurred the obligation" sued on, and the word *"obligation"* has been construed in that State as equivalent to *"liability."*[14] And under this statute attachment has been allowed in an action to recover money lost at gambling.[15]

In Kuehn v. Paroni,[16] the Supreme Court of Nevada, under the statute of that State, similar to that of Ohio, took it for granted that an attachment would lie in support of a demand by the father for a rape committed upon his daughter.

But even when such statutes embrace torts or some class thereof, the courts are extremely cautious in confining the writ to such cases as are plainly contemplated and fully defined by the language of the statute. As, for instance, the South Carolina statute allowed attachments to issue "in any action for the recovery of money * * * or property, whether real or personal, and for damages for the wrongful conversion or detention of personal property, or an action for the recovery of damages for injury done either to person or property, etc."; and the Supreme Court of that State, in 1897, in construing these provisions, held that a writ of attachment would not lie thereunder in support of an action for *slander.*[17] The court took the position that under the well settled law, prior to the code, an attachment would not lie in an action for slander, and since the words used in the statute did not *necessarily* include "slander," the irresistible inference was that the Legislature did not intend to change the previously existing law by including such an action.

Waiver of Tort. Actions in Assumpsit. Implied Contracts.—We come now to the doctrinee of implied promises, where the relation of the parties was originally contractual and clothed in some fiduciary or confidential garb, and where the relation is violated by the one sustaining the trust or fiduciary capacity. In these cases, in many states, the injured party may elect to sue upon the implied promise to pay or refund, instead of proceeding tortwise, and thereby invoke the writ of attachment in support of the action under statutes containing such terms as "actions upon contracts, express or *implied*," or words of like import.[18] These cases proceed on the theory that the plaintiff may waive the tort, and recover upon an implied contract, when

(10) 2 Ohio Rev. Statutes, Sec. 5521; Nev. Stat. 1887, p. 55.

(11) New York, Doissy's Code Civ. Proc. Sec. 635; Clark's North Carolina Code of Civil Proc. Sec. 347; South Carolina Code of Civil Proc. Sec. 248.

(12) Sturdevant v. Tuttle, 22 Ohio St. 111; Kirk v. Whitlaker, 22 Ohio St. 115; Creasser v. Young, 31 Ohio St. 57.

(13) Glidden Varnish Company v. Joy, 8 Ohio Cir. Court Rep. 157.

(14) Sturdevant v. Tuttle, supra.

(15) Wise v. Martin, 5 Ohio S. & C. Pl., Dec., 550; Jenks v. Richardson, 71 Fed. 365.

(16) 19 Pac. 273 (1888).

(17) Addison v. Syette, 27 S. E. 631.

money or property has been obtained by the defendant from the plaintiff by the tortious acts of the defendant.[19] And some cases hold that the tortious act *in itself* creates an implied contract to repay or refund money converted. While the real nature of the cause of action cannot be changed by any mere fiction of pleading or form, as heretofore suggested, yet, as Mr. Cooley, in his learned treatise on Torts, says: "There are a few cases in which a party is permitted to treat that which is *purely a tort* as having *created a contract* between himself and the wrongdoer, and, waiving his right of action for the tort, to pursue his remedy for the breach of the *supposed contract*. * * * No question is made of this doctrine where as a result of the tortious act, the defendant has come into the possession of money belonging to the plaintiff. The law will *not permit him to deny* an implied promise to pay this money to the party entitled."[20]

This doctrine of election to sue upon the implied promise is best appreciated by reference to specific cases, some of which are extreme cases and others which fairly and conservatively apply the doctrine. In Gould et al. v. Baker,[21] the plaintiff hired lodging in a room above the saloon of the defendants, and during the second night his money, amounting to $475, was stolen from under his pillow. He charged the defendants with the fraudulent and unlawful taking of the property and appropriating the same to their own use, without hie consent or knowledge, and that by reason of such wrongful conversion they thereby promised and became liable to pay plaintiff said sum, etc. An attachment was issued in support of this action and sustained by the higher court. This was under a statute that did not expressly provide for attachment in action ex delicto, but simply upon contracts, express or *implied*. The court discusses this proposition at considerable length, citing a number of cases, one of them from Maine,[22] in which one Mary Howe, charged that the defendant, John Clancy, took from her, carried away and converted to his own use $630 in gold coin, which she had laid away in a tin box and which she had buried in the cellar of her dwelling house. The Maine court held that when specific articles have been stolen and have *not been* converted into money, the remedy was probably by an action of trespass or *case*, instead of an action in assumpsit; but if the stolen property was *money*, or has been converted into money, an action of assumpsit for money had and received would be maintainable.[23] In other words, it is argued, that by waiving the tort, the plaintiff simply brings assumpsit instead of trespass or trover and thereby foregoes the advantage he would have if he sued tortwise to claim higher or exemplary damages.

Where a contractual relation exists between the parties, such as attorney and client, master and servant, physician and patient, principal and agent, bailee and bailor, a tort arising out of a breach of the duty imposed by the relation may be waived and special assumpsit maintained. The reason is that the relation of the parties out of which the duty violated grew had its inception in contract.[24] In Nethery v. Belden,[25] the statute of Mississippi was involved, which provided that "the remedy by attachment shall apply to all actions or demands founded upon any indebtedness, or for the recovery of damages for the breach of any contract, express or implied, and to actions founded upon any penal statute." It was an action for account, an item of whic was $51 damages for injury to a horse overdriven by an agent of the defendant. The court held that the horse was over-

(18) Westcott v. Sharp, 50 N. J. L. 392; Penn. Railroad Co. v. Peoples, 31 Ohio St. 537; Elwell v. Martin, 32 Vt. 217; Gould v. Baker, (Tex.) 35 S. W. Rep. 708.

(19) Norden v. Jones, 33 Wisc. 600; Keyes v. Railway Co., 25 Wisc. 691; Graham v. Railway Co., 10 N. W. 60a.

(20) Cooley, Torts, (2nd ed.) pp. 91, 93, 107.

(21) 35 S. W. Rep. 708 (Tex. Civ. App. 1896).

(22) Howe v. Clancy, 53 Maine 130.

(23) Citing Rd. Copp. v. Dana, 1 Gray 83.

(24) Cyc. Vol. 4, p. 332.

(25) 66 Miss. 490, 493; 6 So. 464.

driven while in the possession and care of the defendant as a bailee for hire; and that in such case the bailee or hirer is under an implied obligation to use the animal with such care and moderation as an ordinarily prudent man would use his own property of the same kind, and if he fails to comply with this implied obligation and the bailor is thereby damaged, he may sue either in *case* or assumpsit at his option; and if he sues in *case*, the fraud or negligence of the bailee would be the gravamen of the action, and if he sues in assumpsit, then the implied promise or undertaking and its breach constituted the ground of action, and that under this latter cause of action the attachment would lie under the foregoing statute.[26]

In Nebraska[27] it has been held that if a promise is implied, either from a breach of duty or from the undertaking of the defendant, an attachment will lie. The case enunciating this doctrine was one in which the defendant received from the plaintiff several sums of money to be loaned for the use and benefit of the plaintiff, and upon the expiration and payment of each loan the defendant was to pay the same to the plaintiff, or reloan the same as plaintiff might direct. The plaintiff claimed that no part of a sum of $9221.23, with interest, had been paid him. The court said in substance that if the law will imply a promise, either from a breach of duty on the part of the defendant, or from his having undertaken to repay the money, the action will be treated as arising ex contractu, and attachment would therefore lie. The statute of that state provided that it must appear upon the face of the affidavit in attachment that the debt or demand arose upon contract, express or implied.

It is apparent, of course, that an attachment cannot issue in an action for a mere tort, as by setting on fire, whereby the property of another was destroyed.[28] Almost throughout the whole statutory provisions of the country (with the exceptions already discussed) the words "creditor," "debtor" and "debt" are made conspicuous, and the remedy is confined exclusively to actions ex contractu. Neither in common parlance, nor in legal proceedings, is a mere wrongdoer designated as a debtor, nor his responsibility for the wrong classed under the denomination of "debt." Debts are the creatures of contracts; but that fact does not contradict, nor disparage the proposition that when a person undertakes an employment, trust or duty, he thereby in contemplation of law, impliedly contracts with those who employ him to perform that which he has undertaken with integrity, diligence and skill, and if he fails to do so, it is a breach of contract for which a party may have an action.[29]

In Michigan, attachment is allowed only in actions on contract. In an action in assumpsit, in that state, by a bank for moneys stolen and embezzled by the defendant from plaintiff while employed as a clerk of the latter, an attachment in support of the action was held to be valid.[30] As argued by Campbell, C. J. of the Supreme Court of that state, when the statute gives the remedy by attachment in cases of *express* and *implied* contracts, there is no warrant to graft an exception on the statute and hold that there are differences in implied contracts, and that where an action in tort will lie, the fact that assumpsit will also lie does not make the case one of contract, or that there was any such equity in favor of wrongdoers that exceptions should be created in their favor.

In Wisconsin,[31] the same doctrine is laid down and followed, in an action to recover $1000 paid by an insurance company to the defendant by the latter making false and

(26) See also: Lay v. Lawson, 23 Ala. 377; Clapp v. Nelson, 12 Tex. 370; Harvey v. Murray, 136 Mass. 377; Hyland v. Paul, 33 Barb. 241.

(27) Hart v. Barnes, 40 N. W. 322.

(28) Handy v. Brong, 4 Neb. 60.

(29) Railroad Co. v. Peoples, 31 Ohio State, 543.

(30) Farmers' Nat. Bank of Constantine v. Fonda, 32 N. W. Rep. 664.

(31) Western Assurance Co. v. Towle, 26 N. W. Rep. 104.

fraudulent proofs of loss and by false swearing as to the extent of the alleged loss.[32] But before a party can waive the tort and sue in assumpsit, for the wrongful conversion of *personal property*, it would seem, that the tort-feasor must have converted the property into money or money's worth.[33] Where the personal property of another is converted and sold or turned into money, the sale is treated as having been made for the plaintiff.[34] But actions arising upon default made in the payment of bail bonds, official bonds, appeal bonds, and other undertakings, have been, with few exceptions, pronounced not to be actions upon a "money demand," but actions arising on penalties, and hence, actions sounding wholly in tort and not on contract, express or implied.[35]

Construction of Different Terms Used in Statutes.—The language of the various statutes on attachment is not uniform and some terms used have been construed to embrace torts or some class thereof. For instance, we find the words "for the recovery of money,"[36] or in a "civil action for the recovery of money"[37] or "on contract express or implied for the direct payment of money"[38] or "upon money demands whether ex contractu or ex delicto."[39] A former statute of New York provided for attachment in actions "for the recovery *of money*" and it was held in the earlier authorities of that state that these words embraced demands ex delicto.[40] In Saddlevene v. Arms[41] (New York), it was held that when the statute authorizes attachment where "the action is for the recovery of *the money*" and probably where it merely read "for the recovery *of money*" the relation of debtor and creditor must exist, and especially where the plaintiff is required to state the nature of his "claim" in the affidavit, the word "claim" being held equivalent to "debt." The statute of that state had formerly read "recovery *of money*," under which the earlier decisions grew up extending the remedy to torts, and subsequently the statute was changed to read "recovery of *the money*." But under the later decisions of that state the use of either of these phrases or set of words has been treated as contemplating matters ex contractu.[42]

In one Mississippi case, under a statute authorizing attachment where the person having "the right of action" should make a certain complaint, on oath, it was held that the words "right of action" embraced demands ex delicto.[43] Another case in the same state under a statute confining the remedy to "actions or demands founded on any indebtedness, or for the recovery of damages for the breach of any contract, express or implied, and for actions founded on any penal statute," it was held that the same *did not* apply to actions for tort.[44] It is apparent that the words "right of action" would include a demand for a tort, while the statute construed in the latter case is confined to debts, contracts and breaches thereof, or statutory penalties.

Under the Georgia statute, an attachment was upheld in an action for *breach of a contract to marry*. But this does not meet with general favor, because such breach of contract is classified as a willful and malicious wrong to the personal character wherein damages are assessed strictly as a tort or punishment.[45]

In Delaware, the word "indebted" is

(32) Northwestern Life Ins. Co. v. Elliott, 10 Ins. Law J. 333; S. C. 5 Fed. Rep. 225. See also Catts v. Phalen, 2 How. 376.

(33) Grinnel et al v. Anderson, 81 N. W. 329.

(34) St. John v. Antrim Iron Co. (Mich.) 80 N. W. 998; Watson v. Stever, 25 Mich. 386; Tolan v. Hodgeboom, 38 Mich. 624.

(35) Shinn on Attachment and Garnishment, Sec. 15, page 21.

(36) Minn.

(37) Ark.

(38) Cal.

(39) Georgia Code.

(40) Ward v. Begg, 18 Barb. 139; Floyd v. Blake, 11 Abb. Pr. 349; 19 How. Pr. 196.

(41) 32 How. Pr. (N. Y.) 280.

(42) Shaffer v. Mason, 43 Barb. 501; 29 How. Pr. 55; Crossman v. Lindsley, 42 How. Pr. 107; Gordon v. Gaffey, 11 Abb. Pr. 1.

(43) Lum v. Steamboat Buckeye, 24 Miss. 564.

(44) Fellows v. Brown, 38 Miss. 541.

(45) Morton v. Pearman, 28 Ga. 323; Contra: See Shinn on Attachment and Garnishment, p. 26.

used, and a "showing" must be made "of the cause of action," and these words construed together are held in that state to limit the procedure to actions ex contractu, although if the words "cause of action" stood alone, they would embrace actions in tort.[46] Such is the uniform construction where words of the above import are used; and under similar statutes, in most states, the remedy has been confined to actions ex contractu and many hold that it will be awarded for liquidated damages only.[47]

Without dwelling further upon the multitude of cases and diversified statutes involved in this subject, it is apparent, in the analysis of all of the decisions, that the fundamental principle of attachment remains unshaken, viz., that it is to safeguard demands for debt and not for damages, unless provided for by statute. Some of the authorities betray a disposition to extend the language of different statutes, rather than strictly construe them, and rather incline to hold that it is the duty of the courts to endeavor to reach the wrongdoer by the fiction of an implied promise. Some of these cases are prolix with ingenious arguments, intermixed with many sensible and logical reasons. But, no matter how much the relief by attachment may be coveted nor howsoever just, to secure the collection of damages to the injured party, yet we must be incorrigibly blind to the primary rules and history of this remedy in order to extend the same to actions wholly sounding in tort in the absence of plain and positive statutory assistance. Attachment proceedings in support of actions for personal injuries, for instance, would be almost vicious in their tendencies. Torts may grow out of negligence through the acts of servants and agents, or out of the failure of servants to comply with statutory regulations, or occur through inadvertence or disobedience of the master's orders; or an assault and battery may occur in the sudden heat of passion, as is usually the case, and attachments in support of actions for the civil wrongs would indiscriminately "tie" up property and menace business, and sometimes become the means of extortion and oppression, as well as vexatious litigation; and oftentimes, as in civil actions for assaults and like offenses, supplant in effectiveness and even punishment the criminal code. In many instances the action for damages may be entirely speculative. But in the case of debt, the creditor *furnishes* or parts with property, money, wares, credit or services, and usually deals with the debtor with a view to his property holdings or income and ability to pay or his honesty; and if the debtor is about to leave the state or sell his property to defraud creditors, or about to commit some statutory ground for attachment, the process of attachment serves a salutary and proper purpose. The doctrine of attachment in aid of implied contracts, however, as heretofore discussed, has every element of justice, although such use of the writ in reality affords relief against a tortious act. Where the act is a larceny or a fraudulent representation, it seems to be a little far-fetched to create a contract of such character as to come within the meaning of "express or implied contracts" as used in attachment statutes. But where the parties sustain the contractual and fiduciary relations of attorney and client, principal and agent, trustee and cestui que trust, and the like, and where money is embezzled and misappropriated, the implied promise to repay, which the law supplies on account of the tortious act, is certainly within the meaning of "actions upon contract, express or *implied*," and similar terms as employed in various attachment acts. This may be safely said to be the generally recognized doctrine in most jurisdictions and the progressive trend of all the courts.

WALTER J. LOTZ.

Hammond, Indiana.

(46) Smith v. Armour et al., supra. (Del.)

(47) Drake, Attachment, Sec. 19, 226; 3 Amer. & Eng. Ecy. Law, 134, 138, 191. (2d ed.)

CHATTEL MORTGAGE—CONDITION BROKEN.

FULLER v. McLEOD.

Supreme Court of South Carolina, April 23, 1912.

74 S. E. 647.

A provision of a chattel mortgage covering mules sold that if, before the note was due, the mortgagor "shall attempt to make way with or remove said goods and chattels, or any part thereof, from the place where they now are," the mortgagee could take possession, only prevented the mortgagor from removing the mules in a way so as to impair the mortgagee's security, so that it was error to instruct that the condition against removal would not be broken by any removal of the property from one place to another, unless it was with the view of taking it out of the mortgagee's reach to prevent him from getting it.

WOODS, J.: The defendant on March 29, 1910, purchased from the plaintiff two mules, and for $360.18 of the purchase money gave him a note secured by a mortgage of the mules. The mortgage contained the following stipulation: "And provided, further, that said mortgagor shall retain possession of said goods and chattels until default be made in the payment of said note, but if the same is not paid when due, or if before the said note is due, the said mortgagor shall attempt to make way with or remove said goods and chattels, or any part thereof, from the place where they now are, then, and in either event, the said mortgagee, or his agent, shall have the right, without suit or process, to take possession of said goods and chattels, wherever they may be found and may sell the same or as much as may be necessary, at public auction for cash, after giving notice by advertisement ten days and shall apply the proceeds of said sale to the discharge of said debt, interest and expenses, and pay any surplus to said mortgagor and his assigns."

Both the plaintiff and the defendant were residents of the town of Bennettsville. Plaintiff's place of business was in that town, but the defendant was engaged in the logging business in different parts of the state. In April, 1910, the defendant, having occasion to go to Sumter to attend the trial of a cause in which he was interested as a party, drove the mules to that place. Thereupon Hardison, an agent of the plaintiff, went to Sumter, and made a demand for the possession of the mules on the ground that the defendant had breached the condition of the mortgage against removal of the mules by driving them out of Marlboro county. Upon refusal of the demand, the plaintiff brought this action in claim and delivery. The mules were seized by the sheriff on Monday, and the defendant on the following Wednesday gave the necessary undertaking and regained possession. In his answer the defendant denied that the condition of the mortgage had been broken, and set up a counterclaim, alleging that the plaintiff had wilfully, wantonly, and maliciously brought the action, and had taken the mules from him in violation of his rights. On the trial the verdict was in favor of the defendant for the possession of the mules, and for $25 actual damages and $150 punitive damages.

(1) The presiding judge instructed the jury that the condition against removal contained in the mortgage would not be broken by any removal of the property from one place to another, unless the removal by the mortgagor was "with the view of taking it out of the reach of the party to whom he mortgaged to keep him from getting it." This we think was error. The condition of the mortgage "that, if before the said note is due, the said mortgagor shall attempt to make way with or remove said goods and chattels or any part thereof from the place where they now are," cannot be construed literally, for such construction would have forbidden the removal of the mules from the stable where they then were, or driving them from place to place in the ordinary use for which they were purchased. The reasonable construction is that the provision was intended to protect the mortgagee against any removal of the mules which he could fairly regard an impairment of his security. This was the construction of a like provision on which the case of Marshall Springs & Co. v. Smith, 85 S. C. 196, 67 S. E. 129, was decided. There the mortgagee obtained on the mortgage supplies to be used in the cultivation of a tract of land known as the "Jones place." The mortgagor thereafter moved away from the Jones place taking the mules with him. This was a removal which the mortgagee had a right to regard an impairment of his security, since it was accompanied by a complete change in the mortgagor's business.

(2) But we do not think there should be a new trial for this error of the circuit judge, because there is not the slightest evidence that the defendant did anything more than use the mules in the ordinary course of his business, or that the plaintiff had any reason to suppose that driving the mules to Sumter on an ordinary business trip would have any ef-

fect on his security. This being so, the court will not order a new trial. "This court should not order a new trial where from an examination of the record it has no doubt the verdict of any fair jury would have been the same, even if no error had been committed. In such a case the errors should be regarded not prejudicial." Edgefield Manufacturing Co. v. Maryland Casualty Co., 78 S. C. 73, 58 S. E. 969.

(3) The trial court was also in error in allowing the defendant to prove as actual damages his personal expenses at Sumter and his traveling expenses incurred in the effort to procure sureties on his undertaking. These were special damages not alleged in the complaint, and were therefore not recoverable. Sonneborn v. Southern Ry. Co., 65 S. C. 502, 44 S. E. 77. The only admissible item of actual damages proved was $6.75, paid by defendant for feed of the mules after they were seized. For this error there must be a new trial, unless the defendant will remit all the actual damages included in the judgment except $6.75.

The judgment of this court is that the judgment of the circuit court be affirmed on condition that the defendant shall remit thereon, in writing, within 30 days after the filing of the remittitur $18.75 of the actual damages recovered, and that, if he shall fail to do so, the cause be remanded for a new trial.

GARY, C. J., and HYDRICK, J., concur.

NOTE.—*Condition Broken in Removal of Mortgaged Property.*—There is little opportunity for the discussion of basic principles in the consideration of such a provision in regard to removal of property embraced in a chattel mortgage. Nevertheless, the few cases we have found where the direct question was involved, show some diversity of view. These cases we give below. The question seems a very practical one.

The principal case distinguishes but not very clearly the prior case to which it refers. In that case it was held that taking the mules away from the place where they were to remain at the other place constituted a breach and nothing was said about the security being thereby endangered. The opinion in that case said: "There was conclusive evidence that defendant breached the contract by abandoning the farm and removing the property from the place where he stipulated to keep it, which breach by the terms of the contract gave plaintiffs right to the possession of the mules under the mortgage." Had the principal case merely have said that the use of the mules in the ordinary course of business did not constitute removal in the sense of the mortgage, the distinction would have been clear.

In Jones v. Smith, 123 Ind. 585, 24 N. E. 368, the provision was that mortgagor "expressly agrees not to remove the said property from the place where it now is without the consent of" mortgagee, the property being two horses. Mortgagor "as a matter of favor, permitted a neighbor to temporarily use" one of them. Mortgagee claimed a breach and took possession.

The court said: "There was no such breach of the condition of the mortgage as entitled the appellant to take the property from the mortgagor. The nature of the property embraced in the mortgage assists in determining what use may be made of it by the mortgagor, and if the use is a reasonable one there is no breach of the condition of the mortgage. * * * It is evident that the rights of the mortgagee were not put in jeopardy, and it is also evident that the temporary loan to a neighbor was a reasonable use of the property. The construction for which appellant contends is too harsh and unreasonable to find favor with the courts."

We do not see how the nature of the property plays a part in this decision. As to any farming implement or portable chattel the same argument could be used. This case goes a step further than the principal case does, unless the performance of acts of neighborly courtesy or kindness may be judicially noticed as fairly contemplated by the parties. By the same token a threshing machine could be loaned to neighbors *ad libitum*—a practice that would depreciate its value. There is something here closely approaching a jury question.

In Walker v. Radford, 67 Ala. 446, the exact terms of the clause against removal do not appear. Plaintiff brought injunction, alleging that defendant was about to leave the state and take the mortgaged property—two horses—with her, and plaintiff mortgagee would thereby lose her security. Defendant denied she was about to remove, but admited she was going on a visit to her mother in another state and purposed to use the horses in this way and said horses would be soon returned. The court ruled it was proper to deny the injunction, saying: "If it be conceded to the appellant that a removal of the personal property beyond the jurisdiction of the court was apprehended, and was intended and about to be made, it was a mere temporary removal, not intended to be continued until the maturity of the debt. Nor does it appear there was any increased probability of deterioration in value because of the mere temporary removal, or that in consequence the rights of the mortgagee were placed in serious jeopardy. It is the jeopardy of the rights of the mortgagee by the removal of his property beyond the reach of his legal remedies when he is entitled to resort to them, that forms a ground of equitable interference. * * * But it is not intended that the mortgagor or the debtor shall be hindered and denied the legitimate use of the property, in subservience of his convenience or pleasure." It was also said there was "a manifest intention of returning before the law day of the mortgage, and afforded of itself no ground for a reasonable apprehension," that the property would not be forthcoming, etc.

This extends the liberty of removal very greatly. A present manifest intention ought not to suffice. This might be succeeded after the property had in good faith been placed out of the jurisdiction by a subsequent intention. As a matter of fact, in the interim of departure and intended return, the mortgagor had virtually no security at all. This would seem to have been a change in the situation for which equity ought to have afforded relief.

The view we suggest was taken in King v.

Wright, 36 Minn. 128, 30 N. W. 448. In that case there was a mortgage upon horses and it provided that "if any attempt shall be made to remove, dispose of or injure said property, or any part thereof," mortgagee could take same wherever it might be found, etc. The mortgagor took the horses, as he alleges, for a temporary purpose, to another state, where they were retaken by mortgagee. The court said: "The taking of the property into Dakota was a breach of the condition of the mortgage. Without undertaking to define what, in all cases, would be a removal of the property, within such a condition, we have no hesitation in saying that taking the property for any such purpose whatever, without the consent of the mortgagee, out of the state, and beyond the jurisdiction of its courts, is a removal prohibited by the condition."

C.

CORRESPONDENCE.

JUDGE-MADE LAW.

Editor Central Law Journal:

It is said that in Kentucky there is a county that has no doctors: if a patient gets well, he will not pay; and if he dies, his relatives shoot the doctor. The courts of this country are getting into an analogous predicament.

Several years ago it was the common cry that judges were too technical; that they construed statutes strictly according to the letter, instead of according to the purpose or end for which the statutes were enacted. Eventually the judges began to interpret statutes more liberally, and occasionally read words into a statute or left words out in an endeavor to meet the public clamor for popular construction. Then the howl went up about judge-made laws, and for some years that has been the cry against the courts. Recently the courts of New York returned to the strict construction and by adhering to the letter of the statute held the Compensation Act unconstitutional and that the Tenement House Act did not apply to apartment houses. These decisions brought out a Rooseveltian roar and severe criticism from Mayor Gaynor and others.

What are the courts to do? Many of the people expected that when the distinction between law and equity practice was abolished, the courts would give great elasticity to statutes which were unconscionable and would administer justice in spite of them. This would require less statutory law and take the sting out of the enforcement of civil law.

Would it not be better to give our courts more latitude and when a statute under strict construction would do injustice, allow the court or jury to do justice by varying from the statute so far as necessary to accomplish that end? Would it not be better for the court to give relief immediately in every instance than to unjustly enforce the law until a Legislature may be induced to modify it?

After hearing the evidence and the arguments of attorneys who have carefully examined the law, a court is in the best position to know whether the strict construction will do injustice, and a court should not be required to do injustice under any circumstances. Therefore, I say, let us go one step farther in uniting law and equity, so as to give judges the authority to resort to equity when the statute by reason of its universality will only allow partial justice or will cause an unnecessary hardship in a particular case. If this is court legislation, let us have it.

CHAS. M. SCANLAN.

Milwaukee, Wis.

BOOK REVIEW.

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The book is bound in law buckram and the typographical execution such as it should be from such well-known publishing houses as Bancroft-Whitney Co., San Francisco, and Edward Thompson Co., Northport, L. I.

HUMOR OF THE LAW.

"I went into a stationery store," wrote one of our esteemed correspondents, recently, "and asked the young clerk for blanks for Warranty Deed by Corporation."

He replied most confidently: "With or without Dower?"

An Irishman, a newly appointed crier in the County Court of Australia, where there were a great many Chinese, was ordered by the judge to summon a witness to the stand.

"Call for Ah Song," was the judge's command.

Pat was puzzled for a moment. He glanced slyly at the judge, but found him as grave as an undertaker. Then, turning to the spectators, he cried out in a loud voice:

"Gentlemen, would any of yez be good enough to give his honor a song?"

Senator La Follette, according to the St. Louis "Republic," at a dinner in Madison, Ill., said of a certain notorious trust:

"That trust won't be this year so boisterous and blatant as it used to be. That trust has certainly become subdued."

He smiled.

"Its spirit is as humble now as the spirit of a very ugly man who visited a matrimonial agency and said he'd like to find a wife. But the agent, looking the man over, returned sternly:

"'I'm afraid it won't be easy to find a wife for you, my friend.'

"'I thought,' said the applicant, 'you might have something shortsighted on your books.'"

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Abatement and Revival**—Statutory Construction.—The statutes changing the common-law rule of the survival and revival of actions must be liberally construed.—Crawdfordsville Trust Co. v. Ramsey, Ind., 98 N. E. 177.

2. **Attorney and Client**—Contingent Fee.—A settlement by a defendant with plaintiff, where defendant knew of a contingent fee contract, held to render him liable for the contract fee of the attorney.—Newport Rolling Mill Co. v. Hall, Ky., 144 S. W. 760.

3. **Bankruptcy**—Adjudication.—Execution of a preference may be sufficient to support a bankruptcy adjudication, though it may be one which cannot be avoided by the trustees.—Alter v. Clark, U. S. D. C., 193 Fed. 153.

4.——Attorney Fees.—Attorneys for bankrupt held not entitled to any fees for services in obtaining a judgment in favor of the bankrupt before bankruptcy, but only entitled to fees for collecting the judgment for the trustee.—In re Blum, U. S. D. C., 193 Fed. 304.

5.——Chattel Mortgage.—Chattel mortgage on a stock of merchandise in possession of the mortgagor who thereafter became bankrupt held invalid as against his trustee in bankruptcy for failure of the mortgagee to require an accounting and application of sales to the payment of the mortgage debt.—In re Geiver, U. S. D. C., 193 Fed. 128.

6.——Discharge.—A bankrupt's creditor who held a provable claim under a former proceeding held not estopped to object to the bankrupt's discharge for failure to apply therefor in the first proceeding.—In re Bacon, C. C. A., 193 Fed. 34.

7.——Equity.—A bankruptcy court as a court of equity has jurisdiction in its discretion to award costs against an objecting creditor who fails to substantiate objections to the bankrupt's discharge.—In re Miers, U. S. D. C., 193 Fed 288.

8.——Invalidating Security.—That a security for money loaned was taken in the form of a deed, instead of a mortgage, in order that the money so loaned might not be taxed, did not invalidate the security.—Alter v. Clark, U. S. D. C., 193 Fed. 153.

9.——Indorsers.—A joint note, executed by a bankrupt corporation and another to C. and by him indorsed to a bank for value, held the obligation of the corporation, and C., being liable to the bank as indorser, was entitled to file proof of claim thereon.—In re Elletson Co., U. S. D. C., 193 Fed. 84.

10.——Lien.—That the misuse of a trust fund had operated to swell the general assets of the bankrupt is not sufficient to create a lien on such assets in favor of the cestui que trust.—In re Brown, C. C. A., 193 Fed. 24.

11.——Partnership.—A pretended dissolution of a partnership, with fraudulent intent to place the continuing partner so that he could claim individual exemptions in bankruptcy from the firm assets, is ineffectual as against partnership creditors.—In re Abrams, U. S. D. C., 193 Fed. 271.

12.——Pledge.—Where a pledge of corporate property by an agent was assented to by a bankrupt's president, the bankrupt's trustee was not entitled to recover the property in replevin from the pledgee, irrespective of the factor's act, though the original possession by the agent was larcenous.—Wood v. Simpson, 133 N. Y. Supp. 1069.

13.——Preference.—An assignment of accounts by a bankrupt to secure a part of the price of goods concurrently sold and delivered held not voidable as a preference, but that the assignee was not entitled to apply the balance collected from the assigned accounts to the balance of the debt under a parol agreement with the bankrupt.—In re Empire Cork Co., U. S. D. C., 193 Fed. 225.

14.——Sale by Trustee.—Sale by a trustee in bankruptcy should be set aside only for cause properly shown, and sufficient to move the conscience of the court.—In re Metallic Specialty Mfg. Co., U. S. D. C., 193 Fed. 300.

15.——Selection of Trustee.—Election of a trustee in bankruptcy held not vitiated because he officiated with the bankrupt's attorney.—In re Fisher, U. S. D. C., 193 Fed. 104.

16.——Trust Funds.—Trust funds which have been fraudulently diverted or appropriated by a bankrupt can be recovered of the receiver, if they can be identified, or if the appropriation resulted in increasing the bankrupt's assets that came into the possession of the trustee.—In re M. E. Dunn & Co., U. S. D. C., 193 Fed. 212.

17. **Banks and Banking**—Collection.—When check is indorsed to a bank for collection and credit for deposit to payee's account, agency of

bank to collect is revocable by instruction to bank upon which check is drawn to withhold payment.—Cronheim v. Postal Telegraph Cable Co., Ga., 74 S. E. 78.

18.——Criminal Law.—In a prosecution for aiding and abetting a national bank clerk to misappropriate the bank's funds, by means of fifty different overdrafts, the fact that the bank's officers had knowledge of one or two of the transactions did not relieve them of their criminal character.—Keliher v. United States, C. C. A., 193 Fed. 8.

19. **Bills and Notes**—Antecedent Debt.—One taking negotiable paper as security for an antecedent debt without notice is a bona fide holder.—Miles v. Dodson, Ark., 144 S. W. 908.

20.——Inquiry.—Where a check was presented to an indorsee by a person claiming to be the agent of the maker, the fact that the alleged agent was willing to take a release of his own debt for a part of the amount of the check was sufficient to put the indorsee on inquiry as to the agent's authority.—Johnson v. Harrison, Ind., 97 N. E. 930.

21.——Void Note.—Where a statute merely makes the consideration of a note illegal, the note is valid in the hands of a bona fide holder.—Bluthenthal & Bickart v. City of Columbia, Ala., 57 So. 814.

22. **Brokers** — Commissions. — Where agent employed to effect loan is prevented from attempt to complete transaction by refusal of employer to accept the loan, he can recover the reasonable value of his services.—Little v. Liggett, Kan., 121 Dac. 127.

23. **Building Contracts**—Architects.—Under a building contract requiring an architect's certificate before payment to the contractor, the failure to employ a supervising architect renders it unnecessary to produce such a certificate.—Feldman v. Goldblatt, 133 N. Y. Supp. 945.

24. **Cancellation of Instruments**—Fraud.—In a suit to annual a deed to land on the ground that it was obtained by fraud, defendant, though on obtaining the conveyance by fraud, is entitled to interest on the purchase money paid by him.—Leslie v. Carter, Mo., 144 S. W. 797.

25. **Carriers of Passengers**—Elevators.—One who maintains a passenger elevator which the public is invited to use must exercise the highest degree of skill and foresight consistent with its efficient use.—Cubbage v. Estate of Conrad Youngerman, Iowa, 134 N. W. 1074.

26.——Liability.—A railroad company is liable for injuries to a passenger by the negligence of an employe of another road using the same depot in handling a baggage truck.—Kansas City Southern Ry. Co. v. Watson, Ark., 144 S. W. 922.

27.——Rights of Passengers.—Passengers having paid for passage over three lines of road is entitled to be carried to destination without further payment of fare, notwithstanding error of intermediate line in issuance of t'cket in return for original ticket.—Ann Arbor Ry. Co. v. Amos, Ohio, 97 N. E. 978.

28.——Rules.—In absence of statute, a railroad may adopt a rule that certain trains will stop only at designated places.—Southern Ry. Co. v. Flanigan, Ga., 74 S. E. 85.

29. **Chattel Mortgages**—Surety.—A surety who received security from his principal may deal with the principal respecting such security, and it is not necessary, where defendant gave his note to a bank with a chattel mortgage owned by defendant as security, that the bank should consent to its release on partial payment and substituted security.—Janek v. Buzzelli, Wis., 134 N. W. 1124.

30. **Common Carriers**—Equal Facilities.—A railroad company is bound to permit any express company to operate on its lines.—State ex inf. Attorney General v. Missouri Pac. Ry. Co., Mo., 144 S. W. 863.

31. **Commerce**—Garnishment.—To charge a railroad company as trustee of goods delivered to it as a carrier for interstate shipment would not be an unlawful interference with interstate commerce.—Rosenbush v. Bernheimer, Mass., 97 N. E. 984.

32.——Interference.—Order of Corporation Commission, relating to charges for delivering messages, held not an interference with interstate commerce.—Western Union Telegraph Co. v. State, Okla., 121 Pac. 1069.

33. **Compositions With Creditors**—Oval.—A composition agreement need not be in writing. Atlas Engine Works v. First Nat. Bank, Ind., 97 N. E. 952.

34. **Constitutional Law**—Forfeiture.—Making the entry on the official record of forfeiture facie evidence that preliminary steps to a forfeiture were properly taken under Laws Kan. 32 Sup. Ct. Rep. 248.

35.——Osteopathy.—Requirements of laws as to licensing and registering medical practitioners, which do not contemplate inquiry into applicant's knowledge, held not to infringe the rights, under Const. U. S. Amend. 14, of a person holding a diploma from a school of osteopathy, who has not presented this diploma to the board of medical examiners created by statute.—Collins v. State of Texas, 32 Sup. Ct. Rep. 286.

36.——Public Utility.—The state by any of its agencies may not so regulate the rates of a street railroad company as to withhold from its owners just compensation for its use.—East St. Louis & Suburban Ry. Co. v. City of Belleville.—U. S. D. C., 193 Fed. 95.

37. **Contracts**—Construction.—In construing a contract, partly written and partly printed, the court should give greater weight to the written than to the printed provisions.—John Deere Plow Co. v. City Hardware Co., Ala., 57 So. 821.

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Central Law Journal.

A LEGAL WEEKLY NEWSPAPER.
Published by

Central Law Journal Company

420 MARKET STREET, ST. LOUIS, MO.

To whom all communications should be addressed.

Subscription price, Five Dollars per annum, in advance. Subscription price, including two binders for holding two volumes, saving the necessity for binding in book form, Six Dollars. Single numbers, Twenty-five Cents.

Entered at the Post Office, St. Louis, Mo., as second-class matter.

NEEDHAM C. COLLIER, EDITOR-IN-CHIEF.
ALEXANDER H. ROBBINS, MANAGING EDITOR.

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